

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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United States Court of Appeals
CLERK
FOR THE DISTRICT OF COLUMBIA.

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No. 7473.
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ANNIE LEE JONES, *Plaintiff-in-Error*,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a Corporation, *Defendant-in-Error*.

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BRIEF FOR DEFENDANT IN ERROR.
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SUMMARY OF ARGUMENT.

The presumption of death does not arise until after the expiration of the seven-year period, and during that period the person is presumed alive. Therefore, the second amended complaint shows on its face that the policies lapsed for non-payment of premiums during the lifetime of the insured—or, conversely, that at the time the presumption of death arose the policies were no longer in force.

ARGUMENT.

This suit is brought upon two policies of industrial insurance dated May 1, 1922 (R. 2) and November 16, 1925 (R. 3), respectively, and plaintiff-in-error's second amended complaint contains a count on each pol-

icy. The allegations of these counts are practically identical, with the exception of the description of the policies, and therefore defendant-in-error will refer to the allegations as being those of the complaint instead of the separate counts, and the parties will be referred to as plaintiff and defendant as in the court below.

With respect to each policy the complaint alleges: (1) That "in consideration of the stipulations therein recited and the payment to the defendant of . . . a weekly premium" the defendant agreed to pay plaintiff the amount of the policies upon the death of the insured, and (2) that plaintiff paid the weekly premiums to defendant "until October 8, 1928." (R. 2, 3, 4)

From these allegations it affirmatively appears that the policies lapsed on October 8, 1928, for non-payment of premiums, and no contention is made by plaintiff that they were in force after that date. However, in an effort to state a cause of action by fixing the date of the insured's death during the lifetime of the policies, plaintiff alleges: (1) That on May 3, 1926, "and during the continuance of the said policy, all premiums having been paid," the insured "left his domicile with no known intention of changing the same, under the circumstances inconsistent with his continuation of life, and has not been heard of . . . from said date, which has been more than seven (7) years," and (2) that "on said date, to-wit, *the 3rd day of May, 1926* . . . the said (insured) was legally dead." (R., 3, 4)

Therefore, unless it follows from the allegations of the complaint that the date of the insured's death was May 3, 1926—the date alleged in the complaint and on which date it is alleged the policies were in force—the complaint fails to state a claim upon which relief can be granted.

From the wording of the complaint and the argument in plaintiff's brief, it is clear that plaintiff relies on the presumption of death which arises under the provision of the Code (D. C. Code, Title 9, sec. 31). This provision "is but a declaration of the common-law rule of evidence in regard to presumptive death" (*Groff v. Groff*, 36 App. D. C. 560, 564).

The complaint alleges that the insured left his domicile on May 3, 1926, from which it follows that the presumption of death could not arise until after the expiration of the seven-year period on May 3, 1933, and as the presumption of death at the *expiration* of the seven-year period includes the presumption that the person is alive *during* that period, the allegation that the insured was legally dead on May 3, 1926, is meaningless.

The rule is stated in *Groff v. Groff*, *supra*, where the right of the caveators to maintain their suit depended upon whether Adam H. Groff predeceased the testator. An issue was framed for trial by jury, "Was Adam H. Groff dead prior to the 8th day of March, 1910?" this being the date of testator's death. It appeared from the evidence that Adam H. Groff disappeared from the District of Columbia about April 25, 1906, intending to be gone for about three days, and that his wife received a letter from him the following day from Richmond, Virginia, where he intended going, and that this was the last she ever heard from him although she made efforts to locate him. No reason appeared why he should have abandoned his home and family and disappeared, but there appeared several reasons why he should not have left. Also, there was some evidence that he had been seen and heard from within three years after his alleged disappearance.

After hearing testimony the court directed the jury to answer the issue in the negative, and this was the principal assignment of error. In affirming, this court says:

“The sole question presented is whether or not this evidence is sufficient to overcome the presumption that Adam H. Groff was still alive at the date of his father’s death, March 8, 1910. Section 252 of the Code (31 Stat. at L. 1230, chap. 854) provides: ‘If any person shall leave his domicile without any known intention of changing the same, and shall not return or be heard from for seven years from the time of his so leaving, he shall be presumed to be dead, in any case wherein his death shall come in question, unless proof be made that he was alive within that time.’ This is but a declaration of the common-law rule of evidence in regard to presumptive death. Seven years had not elapsed at the time of the death of the testator since the disappearance of Adam H. Groff. The burden of proof therefore rested upon the caveators to establish his death, and overcome the presumption of the statute. . . .

“... We fail to find from the record any circumstance that is sufficient to overcome the presumption of the statute that, at the time of the death of the testator, Adam H. Groff was still alive. . . .”

The following cases also are authority for the rule that life is presumed to continue during the seven-year period: *Davie v. Briggs*, 97 U. S. 628, 633-636; *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308, 315-319; *United States v. Wildcat*, 244 U. S. 111, 124; *Alexander v. Alexander*, 36 App. D. C. 78, 83; *Hamilton v. Rathbone*, 9 App. D. C. 48, 53-55 (reversed on other grounds in 175 U. S. 414); and *Baden v. McKenny, et al.*, 7 Mackey (18 D. C.) 268, 271.

If this were a case in which it was sought to estab-

lish the death of the insured *as a matter of fact* during the lifetime of the policies and before the expiration of the seven-year period following the alleged disappearance of the insured on May 3, 1926, the cases of *Davie v. Briggs*, *Fidelity Mutual Life Association v. Mettler*, *Alexander v. Alexander* and *Groff v. Groff*, *supra*, would be of assistance in a determination of whether the facts and circumstances surrounding the disappearance and absence of the insured were sufficient *to overcome the presumption of life and justify the inference of death during the seven-year period*. On the contrary, in this case plaintiff relies on the presumption of death *which includes the presumption that the insured remained alive during the seven-year period following his alleged disappearance*, and therefore the allegation that the insured left his domicile "under the circumstances inconsistent with his continuation of life"—aside from being a conclusion of law—adds nothing to the presumption one way or the other.

In *Davie v. Briggs* the complainants claimed part of the proceeds of the sale of lands as heirs of Davie. Davie had been absent and unheard from since 1851, and as the plea of the statute of limitations was raised, complainants contended that the date of Davie's death should be fixed not earlier than the expiration of the seven-year period in 1858—relying on the presumption that Davie remained alive during that time. It appeared, however, that in 1851 Davie left with a party for California and the last heard from them was in November of that year when they were fighting their way through hostile Indian territory, and it was believed by the parties to the proceeding that Davie had died in that year. The court found these facts sufficient

to overcome the presumption that Davie remained alive until the expiration of the seven-year period and to justify the finding that, as a matter of fact, death occurred in the year 1851.

In *Fidelity Mutual Life Association v. Mettler* suit was brought in December, 1897, by the beneficiary of three policies of insurance taken out by one Hunter in October, 1896, and on which but one semi-annual premium had been paid. At the trial it appeared that the insured was last seen alive on December 3, 1896, when he left for another part of the state with the intention of returning in a few days and was not heard from since. A few weeks after his departure a searching party was sent out and found insured's wagon and equipment abandoned where he had camped on the banks of a river, together with evidence strongly indicating that the insured had fallen into the river and drowned—circumstances “such as to scarcely admit of a reasonable hypothesis other than the inference of death” (*Groff v. Groff, supra*). The court recognized the rule that life is presumed to continue during the seven-year period, but that this presumption might be overcome, saying that the question of death “was a question of fact to be determined on all relevant facts and circumstances disclosed by the evidence,” and, following the *Davie* case, the court holds that the evidence was sufficient to justify the jury's verdict that the insured was drowned the day following his disappearance.

In *Alexander v. Alexander*, which was an annulment proceeding, it was contended that the defendant's husband was alive at the time of her marriage to plaintiff. It appeared that less than seven years before the marriage defendant's then husband, being

afflicted with tuberculosis, left for California intending to return and shortly thereafter defendant received a letter stating that he had died, which was the last she ever heard from him. The court held that the uncontradicted evidence was sufficient to remove the presumption that the husband was alive during the full seven-year period.

In the *Groff* case, to which we have already referred, the court found the evidence insufficient to overcome the presumption that Adam H. Groff remained alive during the seven-year period.

Plaintiff filed three complaints in the court below, but in none of them was any effort made to bring this case within the theory of *Davie v. Briggs*, *Fidelity Mutual Life Association v. Mettler*, *Alexander v. Alexander and Groff v. Groff*, *supra*. There is no allegation of facts and circumstances surrounding the disappearance and absence of the insured "which would lead to a conviction that death had occurred within a shorter period than that prescribed by the statute" (*Groff v. Groff*, *supra*), and if recovery is sought on this ground those facts and circumstances must be set out in the complaint (see *English v. United States*, 25 F. (2d) 335).

By relying on the presumption of death plaintiff is, of course, bound by the presumption that life continues during the seven-year period, from which it necessarily follows that plaintiff's complaint shows on its face that the policies lapsed for non-payment of premiums during the lifetime of the insured—or, conversely, that at the time the presumption of *death* arose the policies were no longer in force.

It is respectfully submitted there was no error in granting defendant's motion to dismiss the second amended complaint.

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